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No. 81-2306.

In the Supreme Court of the United States.

OCTOBER TERM, 1981.

LOCAL 66, BOSTON TEACHERS UNION, AFT, AFL-CIO,
PETITIONER,

v.

BOSTON SCHOOL COMMITTEE, ET AL.,
RESPONDENTS.

IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief of the Boston School Committee and Superintendent of Boston Public Schools.

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Question Presented.

Does a district court abuse its remedial discretion in a school desegregation case by directing school officials to maintain the existing percentage of black teachers during a substantial reduction in force when (1) prior orders oblige those officials to increase the percentage of black teachers as part of the desegregation remedy and (2) the seniority provisions of the teachers' collective bargaining agreement are expressly subordinated to lawful federal court orders.

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Parties to Proceedings Below.

Petitioner's statement is accurate except that the defendants are: The Boston School Committee, the Superintendent of the Boston Public Schools, the Mayor of the City of Boston, the Public Facilities Department of the City of Boston, the Massachusetts Board of Education and the Massachusetts Commissioner of Education.

Preliminary Statement.

This brief is submitted on behalf of the Boston School Committee (the "School Committee") and the Superintendent of the Boston Public Schools in opposition to a petition filed by Local 66, Boston Teachers Union (the "BTU") for a writ of certiorari to the United States Court of Appeals for the First Circuit, which petition seeks review of the decision of that court in *Morgan* v. *O'Bryant*, 671 F.2d 23 (1st Cir. 1982).

Statement of the Case.

The statement of the case contained in the petition accurately states the original liability findings of the district court. However, the School Committee does not accept the description of the remedial approach taken by the district court in the area of faculty desegregation. The petitioner's statement also omits reference to a material provision of its collective bargaining agreement with the School Committee.

The district court found that the School Committee has contributed to the dual school system by hiring and promoting a disproportionately small number of black teachers and segregating that small number in black schools. *Morgan* v. *Hennigan*, 379 F. Supp. 410, 456-466 (D. Mass. 1974), *aff'd sub nom. Morgan* v. *Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). The initial faculty desegregation remedy ordered the School Committee to hire black and white teachers on a one-for-one basis until 20% of the faculty was black. *Morgan* v. *Kerrigan*, 388 F. Supp. 581, 583 (D. Mass. 1975), *aff'd*, 530 F.2d 431 (1st Cir. 1975), *cert. denied*, 426 U.S. 935 (1976). On July 5, 1978, the district court vacated the one-for-one requirement and adopted a more result oriented approach. After a series of hearings, the district court con-

cluded that insufficient progress had been made under the one-for-one hiring requirements. The district court ordered that the School Committee "see to it that the percentage of black teachers in the system as a whole exceeds by at least one and one-half percent (1½%), said percentage during the previous year," until the 20% target was reached. Memorandum and Further Orders on Faculty Recruiting and Hiring at 4 (D. Mass. July 5, 1978), Court of Appeals Appendix G.

The district court in this 1978 order abandoned its prior exclusive reliance on hiring to accomplish the remedial ends identified in 1975. The Court noted in a footnote to this order that the School Committee should consider "modifying the excessing policy" as a means to achieve this 1½% annual increment. The "excessing" procedures of the BTU collective bargaining agreement govern the ability of senior teachers whose positions have been eliminated to replace or "bump" more junior teachers within the same certification area. Thus, as the district court later explicitly acknowledged, it contemplated in July, 1978, that some modification of seniority rights might be necessary in order to accomplish the faculty desegregation remedy. *See* Appendix to Petition at A-24. Neither the BTU nor any other party to this case appealed from the 1978 order.

The collective bargaining agreement from which the BTU derived its seniority rights during a reduction in force was signed on September 1, 1980.[1] The layoff and recall provisions of that collective bargaining agreement were made expressly "subject to all applicable State and Federal laws and lawful Orders pursuant thereto." Appendix to Petition at

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[1] The BTU reports that this collective bargaining agreement contained a job security provision as well. Petition for Writ of Certiorari at 6 n.4. This provision was invalidated by the Massachusetts Supreme Judicial Court on May 12, 1982. *See Boston Teachers Union* v. *School Committee of Boston*, 386 Mass. 197, 211-214, 434 N.E.2d 1258, 1266-1268 (1982).

A-35. The July 5, 1978 order imposing the 1½ % annual increment requirement was in effect when this collective bargaining agreement was signed.

Reasons for Denying the Petition for a Writ of Certiorari.

This case does not provide a suitable occasion for this Court's discretionary review for a number of reasons. First, the BTU has not identified any conflict created by the decision below with that of any other court. Second, there are facts peculiar to this case which result in its failure to provide a useful guide to cases presenting otherwise analogous fact patterns. Third, essentially the BTU is seeking a determination, not that the district court committed an error of law, but rather that the district court abused its remedial discretion in a school desegregation case. The exercise of the lower court's discretion was in this instance proper, but in any event, certiorari is not appropriately granted merely to review a district court's weighing of the equities involved.

I. The Decision of the First Circuit Conflicts With No Other Federal Court Decision.

The BTU has not identified a single court decision which conflicts with the ruling of the First Circuit's decision here. Indeed, petitioner acknowledges that the affirmance of the district court's decision is consistent with other rulings in both the First and Sixth Circuits. *See Stotts* v. *Memphis Fire Dept.*, 28 Empl. Prac. Dec. (CCH) ¶ 32,679 (6th Cir. May 7, 1982); *Boston Chapter NAACP* v. *Beecher*, No. 82-1642 (1st Cir. May 11, 1982); *Oliver* v. *Kalamazoo Board of Education*, 498 F. Supp. 732 (W.D. Mich. 1980), *appeal pending*. Accordingly, there is no need for this Court to intervene to resolve a conflict among the circuits.

The conflict between the affirmative action aspects of school desegregation remedies and the collectively bargained requirements of seniority during a reduction in force is a fairly recent phenomenon. This case and *Oliver* v. *Kalamazoo Board of Education*, *supra*, appear to be the only reported school desegregation decisions which address this issue and the approach of these two cases is quite similar. If this approach is followed in other circuits, the need for this Court's resolution of this issue will be accordingly diminished. If differences in approach develop, this Court will benefit in its resolution of such conflicts by the considered judgments of a number of federal courts. In any event, resolution of the issues raised by the BTU at this juncture is unnecessary and would be premature.

II. This Case Involves Unique Factual Circumstances Which Would Limit the Precedential Value of a Decision by This Court.

This case involves material factual circumstances which are not likely to be present in other cases presenting analogous legal issues. As a result, the value of this case as a precedent may be limited.

In this case, the collective bargaining agreement which created the seniority rights at issue here expressly subordinated those rights to outstanding federal court orders. Appendix to Petition at A-35. The BTU agreed to this subordination two years after the district court had entered orders directing the School Department to "see to it" that the percentage of black teachers increased by 1½ percentage points each year until 20% of the faculty was black. The BTU did not appeal this order. Since the order made no exception for reductions in force and, indeed, contemplated alteration of "excessing" procedures in an effort to accomplish the affirmative action goals, the BTU must have known that the subordination clause in the

collective bargaining agreement gave the staff desegregation requirements in outstanding orders priority over seniority rights *as a matter of contract*.

The specific order affirmed by the court of appeals did no more than relax somewhat the requirements of the 1½ % order of 1978. Under the 1978 order the School Department was obliged to reach the 20% target by the end of the 1980-81 school year. The June 2, 1981 order affirmed by the court of appeals permitted the percentage of black teachers to remain at 19.09% during the course of the reduction in force notwithstanding the obligation to reach 20%. This underlying obligation had been in effect since 1978, and the June 2, 1981 order was therefore simply a limited technical modification of that obligation which ameliorated to a modest degree the burdens on senior white teachers.

The upshot of this is that the June 2, 1981 order of the district court did not violate the contractual seniority rights of BTU's members. The BTU agreed in 1980 that those rights were "subject to" a court order which obliged the School Department to increase the percentage of black faculty members by any and all means until 20% of the faculty was black. Given this pre-existing obligation, the order here challenged actually benefitted senior white teachers, albeit only slightly.

The fact of this contractual subordination of seniority rights bears not only on the merits but also on the appropriateness of discretionary review of the decision of the court of appeals. It is reasonable to assume that, in the more typical case, the requirements of teacher desegregation orders will squarely conflict with collectively bargained seniority rights. *E.g., Oliver v. Kalamazoo Board of Education, supra*. The propriety of an order preserving affirmative action gains is less certain if such a conflict exists than in the present situation where the employer has bargained successfully for the right to implement its court ordered affirmative action obligations notwithstanding

the existence of seniority rights. The value of a decision by this Court in this case — at least a decision to affirm — would thus be seriously limited. The resources of this Court would be better reserved until a case presenting the conflict squarely were before it.

III. The Order Challenged by Petitioner May be Reversed Only for Abuse of Discretion and There is Nothing Presented in the Petition to Suggest the Likelihood of Abuse.

Reduced to essentials, the BTU's argument is that the district court and the court of appeals failed to accord sufficient weight to the interests of senior white teachers when some junior black teachers were insulated from layoff during a substantial reduction in the teaching force. Since the formulation of a remedy in a school desegregation case is essentially an exercise in equitable discretion, *see, e.g.*, *Milliken* v. *Bradley*, 433 U.S. 267, 279-280 (1977) (*Milliken II*); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15, 31 (1971), the order challenged by the BTU may be reversed only for abuse of discretion.

There is no indication in the record of this case that the district court abused its discretion in issuing the challenged order. The standards for fashioning a remedy in school desegregation cases were set forth in *Milliken II*, 433 U.S. at 280-281, and it was with reference to those standards that the court of appeals evaluated the district court's order and found no abuse. *See* 671 F.2d at 25-29.

The first requirement of *Milliken II* is that the remedy be "related to the *condition* alleged to offend the Constitution." *Id.* at 280 (citing *Swann* v. *Charlotte-Mecklenburg Board of Education*, *supra*, 402 U.S. at 16). The unconstitutional condition in this case was the maintenance of an intentionally segregated school system which included policies resulting in

the segregation and nonhiring of faculty by race. *See Morgan* v. *Hennigan, supra*, 379 F. Supp. at 445-466. The district court ruled and the court of appeals affirmed the ruling that the creation of a 20% faculty was necessary to remedy that condition. *Morgan* v. *Kerrigan, supra*, 388 F. Supp. at 582-583. The BTU has already challenged that ruling unsuccessfully. The order challenged here merely made explicit what was implicit in the earlier orders: that the obligation to reach the 20% figure was an essential component of the remedy and, therefore, could not be sacrificed during a reduction in force. Since the challenged order undeniably furthered a goal which had already been determined to be related to an unconstitutional condition, the first *Milliken II* requirement was plainly satisfied.

Milliken II next requires that desegregation orders be "remedial," i.e. "designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.'" 433 U.S. at 280 (quoting *Milliken* v. *Bradley*, 418 U.S. 717, 738 (1974)). Again, the earlier rulings by the district court, unsuccessfully challenged on appeal by the BTU, establish the remedial character of the 20% requirement. *See* 530 F.2d at 431.

The third *Milliken II* requirement directs the district court to "take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." 433 U.S. at 281. This, too, was satisfied below. The district court's June 2, 1981 order granted (with minor modifications not here material) the motion of the School Committee proposing the model for effectuating the reduction in force adopted by the district court. *See Morgan* v. *O'Bryant*, 671 F.2d 23, 29 (1st Cir. 1982).

In this instance all three *Milliken II* factors were satisfied by the order of the district court. The BTU never seriously takes

issue with this.[8] Indeed, the BTU never even cites *Milliken II* in its petition. The BTU does not and cannot argue that racially conscious remedies are not a constitutionally valid remedy for past discrimination, for this Court has ruled to the contrary. *See, e.g., Fullilove* v. *Klutznick*, 448 U.S. 448, 482 (1980) (opinion of Burger, C.J.); *id.* at 517-519 (Marshall, J., concurring); *Swann* v. *Charlotte-Mecklenburg Board of Education, supra*, 402 U.S. at 28. The BTU's point is simply that when people are being laid off, seniority rights deserve greater weight than the courts below gave them.

However, the BTU gives insufficient weight to the integrity of the desegregation remedy in this case. The court of appeals noted that if the district court had permitted the layoffs to be conducted in accordance with strict seniority, "the percentage of blacks would have fallen almost to its level nearly a decade ago." 671 F.2d at 28. The BTU does not dispute this observation. Surely the district court acted well within the scope of its discretion in refusing to countenance such an outcome.

Moreover, although the interest of the teachers who lost their jobs is surely a very important one to them and one not to be minimized in any respect, the district court did not order

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[8] The BTU points to certain oral statements made by the district court from the bench suggesting that the diminution in racial discrimination in the Boston Public Schools may have reduced the need for a particular percentage of black teachers. Appendix to Petition at A-25 to A-26. The BTU argues that the achievement of a 20% black faculty is *no longer* remedial. *See* Petition at 12. This argument is incorrect for at least two reasons. First, the context of the district court's comments make it quite clear that it was justifying the modification of prior orders which relieved the School Committee of the requirement of reaching 20% immediately. The diminution in racial discrimination reduced the urgency of keeping to the timetable fashioned in 1978 and no more. Second, neither the BTU nor any other party sought to reduce the 20% requirement. Accordingly, even if there were a basis for reducing the mandatory percentage of black teachers, the district court lacked the occasion to modify the prior orders.

the layoffs. The district court simply insisted that the integrity of its desegregation plan could not be sacrificed while layoffs caused by a fiscal crisis take place. This did not unnecessarily trammel the rights of senior white teachers because, as noted above, the collective bargaining agreement in effect acquiesced in that consequence when it subordinated seniority rights to the earlier court orders. Accordingly, the district court did not even violate the contractual expectations of senior white teachers.

In light of the foregoing, this Court cannot reasonably conclude that the challenged order was an abuse of discretion. There was no basis for the court of appeals to find that the district court's weighing of the equities was "clearly erroneous." *See Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U.S. 1, 10 (1980). Sifting through the record in this case for signs of such clear error cannot be considered the best way for this Court to devote its limited resources when the court of appeals adopted the correct legal standard and concluded that the district court's judgment was reasonable.

Conclusion.

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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